45579 SERVICE DATE – MARCH 24, 2017
EB

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 730

REVISIONS TO ARBITRATION PROCEDURES

Digest:[1] The Board denies a request to reconsider its final rules modifying its arbitration procedures to conform to the requirements of the Surface Transportation Board Reauthorization Act of 2015.

Decided: March 23, 2017

In Section 13 of the Surface Transportation Board Reauthorization Act of 2015 (STB Reauthorization Act), codified at 49 U.S.C. § 11708, Congress directed the Board to "promulgate regulations to establish a voluntary and binding arbitration process to resolve rail rate and practice complaints" that are subject to the Board's jurisdiction. In May 2016, the Board issued a Notice of Proposed Rulemaking (NPRM) proposing to modify its existing arbitration procedures so that its regulations, set forth at 49 C.F.R. pt. 1108 and § 1115.8, conform to the requirements of the STB Reauthorization Act. Revisions to Arbitration Procedures, EP 730 (STB served May 12, 2016). The Board also proposed to correct a mistake in an earlier decision where it inadvertently deleted the standard of review for labor arbitration cases from its arbitration rules. NPRM, slip op. at 7.

After considering the public comments received in response to the NPRM, the Board adopted final rules by decision served on September 30, 2016, as corrected on October 11, 2016 (Final Rules).

This decision addresses the petition to reconsider the Final Rules filed on October 20, 2016, by Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY). SMART/TD-NY challenges several aspects of the Final Rules in its petition to reconsider, which we address below. The petition for reconsideration will be denied because SMART/TD-NY has not demonstrated that the Board materially erred in its decision.

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

DISCUSSION AND CONCLUSIONS

A party may seek Board reconsideration of a decision by submitting a timely petition demonstrating material error in the prior decision or identifying new evidence or substantially changed circumstances that would materially affect the case. See 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3(b). A petitioner alleging material error must do more than make a general allegation. The petitioner must substantiate its material error claim. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where petitioner did not substantiate its claim of material error but instead restated arguments previously made and cited evidence previously submitted). The alleged grounds must be sufficient to convince the Board that its prior decision would be materially affected. See Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); DesertXpress Enters.—Pet. for Declaratory Order, FD 34914, slip op. at 6-8 (STB served May 7, 2010).

SMART/TD-NY asserts that the Board materially erred by imposing the standard of review for labor arbitration cases in a proceeding "instituted to carry out the mandate of [Section 13 of the STB Reauthorization Act]." (Pet. 3.) SMART/TD-NY further argues that the Board erred in claiming it could refer disputes over labor protection to arbitrators, rather than to arbitration. (Pet. 4-5.) Lastly, SMART/TD-NY claims that the Board erred in allowing parties to concede market dominance while not allowing third parties to intervene in rate arbitration proceedings. (Pet. 5-6.) As discussed below, we find that SMART/TD-NY has not demonstrated that the Board materially erred in its Final Rules. The petition for reconsideration will therefore be denied.

Standard of Review for Labor Arbitrations. In 2013, the Board amended 49 C.F.R. § 1115.8 to add a standard of review for arbitration decisions under the Board's then newly revised arbitration program for certain non-labor matters, but in doing so, inadvertently omitted from that regulation the existing standard of review—the so-called Lace Curtain standard[2]—for labor arbitration cases. See Assessment of Mediation & Arbitration Procedures, EP 699 (STB served May 13, 2013). In its NPRM in this docket, the Board explained that "it was not the intention of the Board to alter the standard of review for labor arbitration cases" in Docket No. EP 699 and, accordingly, proposed to restore the labor arbitration standard of review that had previously been in 49 C.F.R. § 1115.8. The Board adopted this proposal in the Final Rules. Final Rules, slip op. at 8.

SMART/TD-NY argues that the Board erred in imposing a standard of review for labor arbitration cases in 49 C.F.R. § 1115.8, as this proceeding was "instituted to carry out the mandate of [Section 13 of the STB Reauthorization Act]," not to address the standard of review for labor disputes. (Pet. 3.) However, the Board instituted this rulemaking proceeding both to carry out the mandate of Section 13 and to correct the inadvertent omission of the standard of review for labor arbitration cases. The NPRM, slip op. at 2, explained that "the Board [was] proposing to modify its existing arbitration regulations . . . to conform to the provisions of the

[2] See Chicago & N. W. Transp. Co.—Abandonment—near Dubuque & Oelwein, Iowa (Lace Curtain), 3 I.C.C.2d 729 (1987), aff'd sub nom. Int'l Bhd. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988).

statute and to make other minor clarifying changes" (emphasis added). Moreover, the NPRM, slip op. at 7, specifically advised the public that the Board had inadvertently omitted the standard of review for labor arbitration cases and now proposed to "correct[] that omission." SMART/TD-NY identifies no reason why it would be improper for the Board to accomplish both goals in a single rulemaking. See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978) (stating that, except as required by the Administrative Procedure Act, "the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided responsibility for substantive judgments").

SMART/TD-NY also alleges that the Board erred in adopting the Lace Curtain standard of review for all labor arbitration cases. SMART/TD-NY states that the Lace Curtain decision:

> made 30 years ago, involved an Oregon Short Line, Article I, Sections 11-12 arbitration, rather than the more numerous disputes arising under Article I, section 4 referee decisions. As borne out in a number of the agency's own citations, the agency does not have labor dispute expertise to act without the input of parties versed in such disputes [sic] resolution.

(Pet. 4.)[3] However, the courts have upheld Board decisions applying the Lace Curtain standard to labor arbitration awards involving conditions other than Oregon Short Line, including the New York Dock[4] and Mendocino Coast[5] conditions.[6] SMART/TD-NY has not demonstrated why the Board's return to a previously well-established, court-approved standard is material error.

Delegation to "Arbitrators" Rather Than to Arbitration. In explaining its decision to restore the Lace Curtain standard of review for labor arbitration cases, the Board stated that the law is clear that the Board can delegate authority "to arbitrators" to adjudicate disputes over the appropriate conditions to impose to protect affected employees. Final Rules, slip op. at 8 (citing Association of American Railroads v. STB, 162 F.3d 101 (D.C. Cir. 1998)). SMART/TD-NY also argues that the Board materially erred by relying on Association of American Railroads in suggesting that the Board can delegate authority to arbitrators, "rather [than] to arbitration." (Pet. 5.) Contrary to SMART/TD-NY's interpretation, the Board cited Association of American

---

[3] Referring to Ore. Short Line R.R.—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Cntys., Idaho, 360 I.C.C. 91 (1979) (setting forth standard labor protective conditions for abandonments and discontinuances).

[4] New York Dock Ry.—Control—Brooklyn E. Dist. Terminal, 360 I.C.C. 60 (1979) (setting forth standard labor protective conditions for consolidations, line sales), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

[5] Mendocino Coast Ry.—Lease & Operate—Cal. W. R.R., 354 I.C.C. 732 (1978), modified, 360 I.C.C. 653 (1980) (setting forth standard labor protective conditions for leases), aff'd sub nom. Ry. Labor Execs. Ass'n v. United States, 675 F.2d 1248 (D.C. Cir.1982).

[6] Black v. STB, 476 F.3d 409 (6th Cir. 2007) (upholding STB decision applying Lace Curtain standard to arbitral decision involving New York Dock conditions); Bhd. of Maintenance of Way Emps. v. ICC, 920 F.2d 40, 44 (D.C. Cir. 1990) (upholding ICC decision applying Lace Curtain standard to arbitral decision involving Mendocino Coast conditions).

Railroads to explain its authority to require arbitration for disputes involving the appropriate labor protective conditions to impose to protect affected employees, not to find that it could delegate its authority to any individual arbitrator, as SMART/TD-NY suggests. Final Rules, slip op. at 8. The Board finds no material error in the citation or explanation in its Final Rules.

Market Dominance and Intervention. Section 11708(c)(1)(C) provides that the arbitration of rate disputes is only available if the rail carrier has market dominance (as determined under 49 U.S.C. § 10707). In the NPRM, the Board sought public comment on whether parties should be given the option to concede market dominance when agreeing to arbitrate a rate dispute (thereby foregoing the need for a determination by the Board) or alternatively whether the Board should limit the availability of arbitration in rate disputes to cases where market dominance is conceded. NPRM, slip op. at 3. Recognizing that the arbitration process is voluntary and that market dominance determinations may significantly delay the arbitration process, the Board allowed parties to concede market dominance in arbitration of rate disputes. Final Rules, slip op. at 6. The Board further stated that parties would also have the option to arbitrate rate disputes where market dominance is not conceded. Id.

Also in the Final Rules, the Board declined to change its existing rule barring third parties from intervening in arbitration proceedings. SMART/TD-NY had argued in its comments on the NPRM that disputes subject to arbitration may have important repercussions in other areas and markets, and that therefore the Board should allow third parties to intervene in arbitrations. The Board declined to adopt SMART/TD-NY's proposal because it would be contrary to the informal, voluntary nature of the arbitration process. Final Rules, slip op. at 8.

In its petition for reconsideration, SMART/TD-NY asserts that the Board erred in allowing parties to concede market dominance in arbitration rate disputes, contending that "allow[ing] waiver of market dominance" may result in "discriminatory and preferential treatment between carriers and shippers," particularly when third parties are denied the right to intervene in arbitration proceedings. (Pet. 5.) However, SMART/TD-NY fails to demonstrate any material error.

Contrary to SMART/TD-NY's suggestion, the Board is allowing parties to concede that market dominance exists in a particular rate matter—not waiving the requirement in 49 U.S.C. § 11708(c)(1)(C) that arbitration of rate disputes is only available if market dominance exists. As the Board explained in the Final Rules, giving parties the option to concede the existence of market dominance in a particular case will help facilitate a voluntary arbitration process that may otherwise be delayed by having the Board make a market dominance determination under 49 U.S.C. § 10707. Final Rules, slip op. at 6. The Board's approach also is consistent with formal rate proceedings, where a defendant railroad may concede market dominance. See, e.g., Duke Energy Corp. v. Norfolk S. Ry., 7 S.T.B. 89, 97 (2003) (noting that rail carrier conceded market dominance).

SMART/TD-NY fails to show that allowing parties to concede the existence of market dominance could lead to discriminatory and preferential treatment between carriers and shippers. SMART/TD-NY suggests that such discrimination may arise due to the existence of "many competing sources of origins and destinations for numerous commodities and services," (Pet. 5),

i.e, geographic competition.[7] But there is no reason to think that a railroad's decision to concede market dominance would be influenced by the presence or absence of geographic competition because the Board does not consider geographic competition when making market dominance determinations. Mkt. Dominance Determinations—Product & Geographic Competition, 3 S.T.B. 937 (1998) (excluding geographic competition from market dominance analysis because considering geographic competition is not statutorily required and imposes substantial burdens on the parties and the Board); see also Ass'n of Am. R.R.s v. STB, 306 F.3d 1108 (D.C. Cir. 2002) (denying challenge to Board's decision to exclude geographic competition from market dominance analysis); Indirect Competition, slip op. at 1-2 (declining request to consider reintroducing geographic competition as a factor in market dominance analysis).

SMART/TD-NY states that the Board adds to the "discriminatory" nature of its arbitration procedures "by denying intervention to third parties." (Pet. 6.) SMART/TD-NY acknowledges that the Board denied third-party intervention because to allow it would contravene the informal and voluntary nature of the arbitration process. (Id., citing Final Rules, slip op. at 8.) But SMART/TD-NY asserts that this explanation ignores "the character of the Nation as a large common market, and the benefit from the free flow of commodities and services," as well as the need to allow rail employees, communities, ports, and the public to be heard regarding rail rates that might affect their interests. (Pet. 6.) However, SMART/TD-NY does not explain how the free flow of commerce depends on allowing third parties to intervene in rail rate arbitration proceedings. SMART/TD-NY provides no reason for the Board to conclude that arbitrators will likely make poor decisions in rail rate disputes without hearing from third parties, thus impairing commerce.

For these reasons, the Board finds no material error in the Final Rules, and SMART/TD-NY's petition for reconsideration will be denied.

It is ordered:

1. SMART/TD-NY's petition for reconsideration is denied.

2. This decision is effective on the day of service.

By the Board, Board Members Begeman, Elliott, and Miller.

[7] See Pet. of the Ass'n of Am. R.Rs. to Inst. a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Mkt. Dominance Determinations for Coal Transported to Util. Generation Facilities, EP 717, slip op. at 1 (STB served Mar. 19, 2013) (Indirect Competition) (defining geographic competition as the ability of the complaining shipper to "avoid using the defendant railroad by obtaining the same product from a different source, or by shipping the same product to a different destination").